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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 168.

ELIZABETH S. OVERBY, LEONORA H. PACE, KATE CULBERSON, PAUL BLECKLEY, LOGAN BLECKLEY, AND HARALSON BLECKLEY, PLAINTIFFS IN ERROR,

vs.

FANNIE H. GORDON.

ON WRIT OF ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Brief of Argument for Plaintiffs in Error.

This case comes before this court on a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court (R., 27), which affirmed an order of the supreme court of the District of Columbia, holding a special term for orphans' court business, admitting to probate a paper purporting to be the last will of one Hugh A. Haralson, deceased.

The order of such special term was entered after proceedings had on a caveat filed by the plaintiffs in error. The issues (R., 7) turned substantially upon the question whether

the decedent at the time of his death was a resident of the District of Columbia or of the State of Georgia, wherein he died, and such issues were determined in the former alternative (R., 7).

The matter of *residence* is important, because the alleged will, which concerns *personalty* only, has but *one* subscribing witness (folio *1*), and would be invalid if the testator had been a resident of Georgia, where *three* such witnesses are required by the probate laws, but valid if he had been a resident of this District, where none is required. (See *Extracts*, &c., at back of this brief, "sec. 2383.")

The propounder of the alleged will is a sister of the decedent, and a principal beneficiary under that paper. The caveators are two other sisters and the children of a sister deceased. The propounder and caveators are the decedent's sole next of kin, and all, except one of the caveators, are residents of Georgia (*4*).

The allegations of the petition for probate in respect of the residence in question are (*4*), that several years before his death the decedent changed his *residence* from Georgia to this District:—whilst, according to the contention of caveators, that *change* had not been one of *residence*.

Upon the trial of the issues and after the propounder had rested (*10*), the caveators offered on their part a transcript of a record of certain proceedings *inter partes* in the court of ordinary of De Kalb county, Georgia—as tending to show that the decedent was at the time of his death a resident of that county and had there died intestate; and that the plaintiff was a party to such record and estopped thereby; but the trial court excluded such transcript of record, and the defendants thereupon excepted to such ruling.

Thereupon, the jury having found that the decedent was at death a resident of this District, and this finding having been certified to the orphans' court (*8*), the latter ordered that the will should be admitted to probate, &c.; and the caveators appealed to the Court of Appeals; where the action below was affirmed; and the caveators appealed again, to this court.

For error, the appellants assign that action by the Court of Appeals, particularly in regard to the exclusion of the record.

The short point of law understood to be presented here, is, therefore, The operation within a court of the United States of a supposed estoppel by a previous *finding* in a case *inter partes* which had pended and passed into judgment in a State court of general jurisdiction.

The contents of that record were in substance as follows (*11 et seq.*):

1. A petition by "Logan Bleckley" [one of the caveators] showing that Hugh A. Haralson had died "*a resident of said county, intestate,*" leaving property worth about $10,000, and that the petitioner is one of his next of kin. The prayer was for "*an order directing that citation be issued herein and published as the law requires, and that if no good cause can be shown to the contrary,*" the petitioner be appointed administrator (*11*).

2. The ordinary's order for citation, dated April 6, 1896.

3. An order by the court of ordinary, referring to the above petition for letters, &c., upon the estate of Hugh A. Haralson, deceased, and reciting "*that citation therein was issued and published according to law, requiring all concerned to appear at this term and show cause, if any they could, why such letters should not be granted; and it also appearing that said deceased died a resident of said county, intestate, and that said applicant*" is lawfully qualified, "and no objection being offered thereto, it is therefore ordered" that said applicant be appointed administrator, upon giving bond with approved security in $20,000 and taking the oath, &c.

[NOTE.—In thus placing the jurisdiction of the De Kalb court upon the matter of the *residence* and *intestacy* of the deceased, the petition and the accompanying grant of letters respectively asserted and decided, as against all persons bound thereby, that not only *administration* but, by a necessary implication, *succession and future distribution* as well, were to be in that case governed by the laws of Georgia.]

4. The oath.

5. The bond.

6. A certificate of the clerk of the court of ordinary, W. M. Ragsdale, that the transcript is a full and exact copy, &c., and,

7. A certificate by the same Ragsdale, as "ordinary of the county and State, and presiding judge of the court thereof," that the said clerk is such, and his foregoing certificate and attestation in due form. (See 2 Black, Judgts., sec. 879. And Comer *vs.* Ross, 100 Georgia, 652: "The or-

dinary is an official charged with duties judicial, ministerial and clerical. * * * He is also, in office, his own clerk.")

Courts of ordinary in Georgia are courts of *general* jurisdiction:—Veach *vs.* Rice, 131 U. S., 314:—Have "just the same jurisdiction until the case be removed by appeal as the superior courts have after." (Perkins *vs.* Attaway, 14 Ga., 273; so 47 Ga., 195; 50 *id.*, 231; 72 *id.*, 725; &c.).

The standing, at home, of the Georgia court of ordinary is illustrated by the three following cases:

Stewart *vs.* Golden, 98 Ga., 479, concerned the validity of a deed by an administrator appointed in 1861 by the court of ordinary of Meriwether county; and by it afterwards authorized (1874) to sell and convey land; and the title so given was in question. It appeared that in 1890, after the pending action had been brought, the defendants therein applied to the same court of ordinary to set aside the order of 1861, on the ground that in fact the deceased had not resided in that county; and after service of a rule, no defense being made, this had been done; and, further, such last order having been introduced in evidence in the court below, the jury had been instructed to find for the plaintiff, and accordingly had done so.

The question in the Supreme Court was whether the order *to set aside* was not *void* under a certain statute, because not made within *three* years after the order of 1861 had been given.

To this the court said that, as the party objecting had been a party to the proceeding to set aside, he was concluded from raising such objection: "The ordinary had jurisdiction of the subject-matter and the parties, and a judgment unreversed would bind all parties who were before him. * * * When one is in court he must make his defense; if he does not, he cannot afterwards insist that the judgment is void."

Arnold *vs* Arnold, 62 Ga., 627, is an interesting case in the same connection. A, who had previously been a resident of Georgia, removed to Arkansas, and after being domiciled there died, leaving two paper-writings in the nature of wills; and also personal estate to a considerable amount in Georgia. Thereupon the next of kin, disregarding such papers, applied in Coweta county, Georgia, for letters of administration. Whilst this pended upon appeal, the several beneficiaries under the paper-writings applied in Fulton county, Georgia, for probate of one of these, and for a mandamus to enforce the other,—treating it as a disposition *inter vivos*. Pending these proceedings, a bill in equity was filed by the applicants for *probate*, praying for an injunction against the application for letters of *administration*, until that for probate had been determined,—and for an injunction against the mandamus.

The court refused this prayer, saying, amongst other things: "The application in Coweta county for letters of administration went upon the ground that James Arnold died *intestate*, and that he *left assets in that county* to be administered. These questions are both covered by the caveat, and the caveator and the applicant are at issue upon them.

The complainants in this bill can become parties to that issue if they please to do so. They and all the world beside have been cited to appear and show cause against the application for letters of administration. The court of ordinary of Coweta is perfectly competent to decide whether the deceased died intestate, and also whether he left assets in Coweta. There need be no anticipation of a mistake, or of an erroneous decision upon either question. If perchance error should be committed, there is an easy corrective by means ultimately of a writ of error to this court."

Tant *vs.* Wright, 65 Georgia, 412, was a suit for land, brought in Richmond county by certain *heirs*. The defendants claimed through a sale, &c., by the *administrator* under an order by the *Floyd county* court of ordinary, by which also the administrator had been appointed. The heirs denied the jurisdiction of that court to make the appointment, because at death the decedent had resided in *Richmond county*. The record of the appointment showed a recital that the deceased was *late of said county of Floyd*.

The Supreme Court said, page 414: "The court of ordinary of Floyd county therefore had jurisdiction of the general matter of granting letters of administration on estates of dead persons; and, as it had that general jurisdiction, even if the fact did not appear on the face of the letters and proceedings that the intestate died a resident of Floyd county, and that this fact was made known to the court of ordinary and judicially determined by that court, the presumption would be that that had been done. But when it is recited in all the proceedings before that court and in the letters themselves that the deceased was of that county at the time

of his death, it is patent that the court passed upon that question and adjudicated it. If so, the heirs-at-law, adult or minors, are concluded by that judgment just as much as they would have been had a plea to the jurisdiction been filed and witnesses examined thereon *pro* and *con*, and the plea overruled. At least they would be concluded in all courts except that which rendered the judgment, where it could be attacked and set aside or revoked, or in a court of chancery on a proper case made. Such seems to be the great current of authorities cited by the defendant in error, and such unquestionably is the law of this State as adjudicated by this court in 7 Georgia, 362."

The series of facts, with their respective dates, which led to the action shown in the record now in question is as follows:

The decedent died, August 23, 1895, folio *4*, having executed the will, *3*, upon the 14th of the same month.

The petition for probate, *4*, was presented January 23, 1896, and the caveators came in, *6*,—March 6, 1896.

The issues, *7*, were filed April 10, 1896.

These were, in substance:

1 and 2. "Was the said deceased, *at the time of his death*, a resident of the District of Columbia," *or*, "of the State of Georgia?"

3 and 4. Same issues, in respect of "*the time of making the paper-writing purporting to be his last will.*"

5. "At the time of his death, did any considerable part of *his* personal estate lie within the District of Columbia?"

The petition for administration in Georgia was filed, folio *23*, April 6, 1896.

The names of the next of kin and their places of residence are stated, *5*, in the petition for probate.

The question presented by the assignment of error is as to the operation, under the details of the record, of the familiar "faith and credit" rule of the Constitution, (and Revised Statutes, section 905) within the courts of this District, upon a record of judicial proceedings in a court of general jurisdiction in Georgia. (See Henley *vs.* Donohue, 116 U. S., 1.)

We will notice first certain detached points in the record, some of which affect this case without concerning the general theory of *estoppel* herein presented.

(1) The parties in the two cases here are the same, viz., all of the next of kin of the decedent: and these have appeared *personally* in the pending case; but in the Georgia case, excepting the petitioner of course, were brought in *by publication* under a statute. Secs. 3394 and 4254 of the "Code of Georgia:" see end of this brief.

(2) And in this connection it will be noticed that all of the next of kin but one *caveator*, are *residents* of Georgia, and therefore are bound by its statutory provisions for *constructive service of process*. So that the judgment against the caveatee in conformity with that statute, and the findings, are deemed by other courts within the United States to have been rendered with *jurisdiction* as to her. (Grover *vs.* Rad-

cliffe, 137 U. S., 287; Knowles *vs.* Gas Light Co, 19 Wallace, 16; Wharton, Conflict, &c., sec. 708; Story, do., p. 809, Bigelow's note *b;* 2 Black, Judgments, sec. 836; 1 Duvall, Ky., 329; S. C., 38 Am. Dec., 629).

(3) Nor is the circumstance here that the finding was made in a suit *commenced pending the one in which such finding is invoked*, any matter of objection to its introduction. This is so even where the judgment itself is invoked (1 Chitty, Pl., 689, note *u;* 1 Taunton, 333; 2 Black, Judgments, sec. 791; Emery *vs.* Fowler, 39 Me., 326; 63 Am. Dec., 326). Much more when it is *an admission* therein made *by a party to such pending suit* that is offered. For any party is free to give away a right of action by admissions, direct or indirect, made at any time before judgment. Whether these *admissions* are *in pais*, or are imputed for reasons of general *policy* to certain inaction and *default*, can make no difference.

(4) Another matter remarked upon in the argument below was—an alleged *contempt* of the orphans' court, committed by the caveators after they had become parties to the case below, by instituting similar proceedings in the Georgia court; and something was said in the same connection as to violation of *comity* by the latter.

It seems certain that the mere application for action *in rem* in Georgia was no violation of courtesy, and no contempt of the courts of this District. For, a District administrator *cum testamento annexo*, supposing this will (which appointed no executor) admitted to probate, would have had no authority in Georgia, even in the absence of the above-mentioned application. And if such application were innocent in itself, certainly the allegations in support of it could in

reason be limited only by the candor of the applicant. The fact that he had openly asserted such *residence*—by caveat *previously* filed in the orphans' court of this District, and again by deliberate challenge (given in the court of ordinary of the very county in which the caveatee was then and had long been resident) to disprove such allegations,—seems to be irreconcilable with *concealment*, or with *contempt*, technical or other; and equally so, with *want of comity* upon the part of the court which entertained the application, and thereafter pursued the even way of the law in making the finding in question.

The earlier assertion of that *contention*, within this District, was indeed a candid notice to all concerned that the caveators might follow it up by any consistent action whatever; *ex. gr.*, in the very county of the residence of the propounder,—a selection of venue certainly not an outrage upon any proprieties involved. The application within that venue after notice according to law merely followed up a previous *hint*.

Indeed, if it be true, as seems to be clear upon principle, and also has been *held*, in Last Chance Co. *vs.* Tyler Co., 157 U. S., 683, *that a judgment by default entered after full opportunity has been given to appear and contradict, is to be treated in itself and its essential incidents as if made after full contradiction by the defendant*,—the question occurs,—Why did not *the caveatee* appear in the court of ordinary, and there deny and disprove the allegation of a Georgia residence? The general conclusiveness of the judgment by default in question therefore embraces a special conclusiveness as to negligence from this point of view—such negligence we mean as deprives the plaintiff of any claim to suggest *con-*

tempt, or *want of comity*, by the opposite party, *or by the court of her place of residence.*

(5) The last of these minor points arises out of the circumstance that the order in the Georgia court to which this finding was incident, was limited *by the bounds of that State,—i. e.*, was for the appointment of an administrator;—which may occasion a suggestion that the finding itself could have no operation beyond such bounds. It is submitted that the principles already noticed as dividing the operation of *findings* from that of *judgment*, indicate that this suggestion should be answered in the negative. But it has also in effect been so decided, and argument is therefore needless; Dobson *vs.* Pearce, 12 N. York, 156;—the language of which decision has been quoted from with approval in Embry *vs.* Palmer, 107 U. S., 3, 12; see also Cole *vs.* Cunningham, 133 U. S., 147.

To proceed with the general argument:

The case of The Southern Pacific R. Co., 168 U. S., 1, already referred to, was one in which the United States had filed a bill to quiet title to a large quantity of public land more or less affected by previous land-grants for railroad purposes; and a question arose as to the bearing upon the defense, of a suggestion by the Government of *res judicata*, by previous decrees or findings of the courts in regard to other lands in like case: one especial question being, whether a finding that a certain map had been one of *definite location*, was conclusive of that matter, it being urged

per contra that in fact it had not even been in issue in the previous case, or even discussed.

We quote the following rule from page 48:—

"The general principle announced in numerous cases is, that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must as between the same parties or their privies be taken as conclusively established so long as the judgment in the first suit remains unmodified."

Of the fifteen cases referred to by the court in that connection, *several* had held that the suit in which the finding was made need not have been upon the same cause of action as that in which such finding was invoked; *others*—that if the former proceedings be not pleaded, but only introduced in evidence, they are nevertheless *conclusive* of the matter found in them; whilst the case, Last Chance Co. *vs.* Tyler Co., is quoted for the rule that "judgment *by default* is just as conclusive an adjudication between the parties of what is essential to support that judgment as one rendered after answer and contest:"—an expression to the same effect as one quoted above from Tant *vs.* Wright, 65 Ga., 412.

[In connection with the quotation last made it seems convenient to quote further, as follows, from the same opinion, reported in 157 U. S., 683:

"The essence of estoppel is that there has been a judicial administration of a fact, and the question always is, Has there been such administration?—and not, Upon what evi-

dence or by what means it was reached? A failure to answer is an admission of the truth of the facts stated in the complaint, and the court may properly base its administration on such admission. Suppose a defendant files a denial, and on the trial the only evidence is the testimony of a witness to an admission made by the defendant out of court, and upon such testimony the judgment is rendered, is it any the less a judicial administration because resting simply upon proof of the defendant's admission. And yet in principle what distinguishes that case from this? In each the judgment is resting upon an admission of the party against whom the judgment is rendered, and does it make any difference in what form that admission is presented to the judge? [And, quoting from Freeman on Judgments:] 'Upon principle, we think that the denial of a fact subsequently judicially established ought not to impart to a judgment any greater effect than if all the parties had expressly or impliedly admitted the fact to be beyond controversy when such adjudication was made; and this is the view taken by the greater portion of the American courts.' [Then, quoting from Bigelow on Estoppel:] 'The meaning is simply that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined upon the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgments on the pleadings.'"]

In further discussing the case of The Southern Pacific Railroad Co., the court said,—replying to an objection that there was no *plea* of estoppel:

"The judgment in the prior suit,—the present being on a different cause of action,—could not be pleaded as an absolute bar arising upon the face of the record, but could be used *as evidence* to support the contention that the maps of 1872 suffi-

ciently identified the lands granted by the act of 1866. The contrary is again asserted by the railroad company in this suit. But that precise issue was made in the former suit, and was determined for the United States. And to establish that fact the latter introduced the former record as evidence in its behalf."

The court concludes this point by saying that even if it had been competent for the Government, by appropriate allegations, to *plead* the previous judgment, &c.—" it was not bound to pursue that course, or to amend its bill and set out what was only evidence of its title " (pp. 57, 58).

The last topic in the above case to be noticed is one in which a matter much debated in the reports is settled, viz., as to the *weight* to be allowed to former judgments, etc., when introduced in evidence without having been pleaded. These are held to be *conclusive* (pp. 59, 60).

We come now to two cases which, if the minor points in the present one have been met, appear fully to sustain the general contention of the appellants:—Caujolle *vs.* Ferrié, 13 Wall., 465; and Blackburn *vs.* Crawford, 3 Wall., 175.

1. In the former of these a bill had been filed in a circuit court of the United States by certain alleged next of kin, for *distribution* of an estate; and the defendants (administrators) had pleaded, in bar, a finding by courts of the State—*surrogate*, &c.—upon a contest for administration upon the same estate, and betwixt the same parties:—that one Ferrié, a son of the deceased, who had been alleged by the now plaintiffs to be illegitimate, was legitimate, and therefore next of

kin, and entitled to administration. The court below overruled that plea, and the case went to hearing upon the merits, with the result that Ferrié was again found to be legitimate. And the plaintiffs appealed. Upon the hearing above the Supreme Court recurred to the judgment *upon the plea*, in the circuit court, and reversing that, dismissed the bill.

It will be noticed that Caujolle's case, like the present, was one in which a finding in a State probate court upon an application for administration *inter partes*, was held to estop the same parties in a subsequent proceeding concerning the same general matter, viz., *succession*, before a court of the United States. There, as here (see statutes at end of this brief) the court which had made the finding when sitting in matters of *administration*, was a court of *distribution* as well; and therefore the following passage in the opinion is quoted as pertinent:

"They say the point was cognizable only incidentally, but how can this be, when the surrogate could not have done the thing which he did do without deciding it? It had to be decided in order to determine to whom the letters should issue, and the decision of it, of necessity, settled the distribution of the estate. If this litigation can be renewed in a separate suit for distribution in another court, then the same persons can try the same question, in respect to the same subject, in two different suits. * * * Suppose the suit for distribution had been brought in the surrogate's court, can there be a doubt that the decree granting administration to Ferrié would be pleadable in bar to it? If such be its effect in that court, can or ought it to have a different effect in another court of concurrent jurisdiction?"

It will be noticed from the record of Caujolle's case that the Supreme Court was alert in availing itself of an opportunity for applying the doctrine of *res judicata* in respect to *findings*. For the court below had gone on to affirm the previous action of the surrogate, *upon the merits*. But the Supreme Court, considering, apparently, that the plea contained wholesome doctrine, made its decision to turn upon *estoppel*. The second suit there was for *distribution*, whilst here the second suit is one of the exceptional cases in which a Federal court may grant *administration*. This difference may be read into the above *catechism* by Mr. Justice Davis with *a fortiori effect*: viz., that if *the Georgia court* could not for any purposes affecting the *distribution* of the estate have reversed its findings in the course of *probate*, as to the residence of the decedent, how can this be done by a court of concurrent jurisdiction?

[Noticing the English authorities cited by the court in Caujolle's case, it may be pertinent to add that inasmuch as the "new" Court of Probate in England is not, as its predecessor was, a court of *distribution* also, its findings as to *residence*, etc., in cases *inter partes* are no longer binding for cases of distribution, in the courts of chancery—as by the cases cited it had previously been. The very interesting and elaborate case of Concha *vs.* Concha, L. R.—finally reported in 11 Appeals, 541, 556, 564, turns, in one aspect, upon this statutory change of law.]

2. Blackburn *vs.* Crawford, 3 Wall., 175, is referred to in Caujolle's case as exhibiting the same "principle." That ~~latter~~ was *ejectment*, brought in the U. S. Circuit Court for

Maryland by the Crawfords, as heirs, etc.: and one *defense* was that these persons were not *legitimate*. For this the defendant offered a record of a Maryland orphans' court in a contest betwixt himself and one of the plaintiffs, for administration upon the estate of the ancestor. But it was excluded. Upon appeal, the Supreme Court held that this *was error*.

Here, as may be noticed, a finding concluded only that one of the Crawfords who had been a party to the contest in the orphans' court,—whilst, as is certain, the others were as much bound as he *by the appointment itself*,— the *res*.

We close this brief by noticing specially *three* points which appear to be somewhat prominent in the two opinions (in chief, and dissenting,) delivered in the Court of Appeals. For other parts of these opinions, there is little left to us beyond *a mere repetition*, as above, of the contention, heretofore relied upon by us in the courts of this District, as above.

1. The Orphans' Court below has at no time had *possession*, either actual or constructive, of the assets of the decedent. If at the initiation of the caveat, or some other time, it had appointed an administrator *pendente lite* this might have been otherwise. But no application was made for such appointment, or for any other action looking to the taking charge of such assets.

Accordingly, Heidritter's case, and the six others, referred to together upon page 22, top, of the record, do not support the suggestion in that connection,—of an improper interference by the Court of Ordinary in Georgia,—or by parties

litigant therein, with a *res* then in the custody of the Orphans' Court here. For in every one of those cases the *res* in question was in the possession of some receiver, marshal, or other official of the court that had been interfered with.

2. Johnson's case, and four others, referred to upon page 24, bot., are authority for the familiar rule that an appointment of an administrator etc. within one jurisdiction, does not conflict with a like appointment made later in another jurisdiction. But in the passage here in question they are used as authority for the position that *findings of fact* betwixt adverse parties in course of the application *inter partes* for *such* former appointment, are *incompetent* as evidence betwixt the same parties upon the application for *such* second one.

We submit that the cases cited do not support that position;—a position which otherwise is directly contradicted by authorities cited above,—p. [illegible], etc. And upon general principles it seems plain that if in qualifying itself for official action within its jurisdiction and duty, whether such action is to be, upon one hand of brief or particular, or upon the other, of permanent or general operation, it becomes necessary for the court to establish some preliminary fact,—*the binding operation of such finding inter partes must correspond with its own character as formulated; and does not depend upon that of the judicial action to which it may then or there be incidental.*

3. Whilst we have congratulated ourselves, and still do, upon the countenance which our contention has received, in the dissenting opinion below,—yet we may be allowed at

the same time a *protest* against a suggestion therein (Rec., p. 28 top), that the Georgia record, *although competent, is not conclusive* as evidence of the facts *found* therein.

The case upon the record is a full equivalent (see *Last Chance Co. vs. Tyler Co. and Tant vs. Wright*, as above) *for one, ex. gr., in which,—in the Georgia court, the present appellee, had actually appeared, and had thereupon alleged, and introduced witnesses to prove, that the decedent was at death not a resident of De Kalb county, and did not die intestate; in which also the court had found to the contrary of such allegations, and had appointed an administrator accordingly:—the present appellee thereupon taking no appeal, or further action.*

We understand *Whicker vs. Hume*, 7 *H. of L. Cases*, 124, to be referred to in the dissenting opinion below, p. 29 bot., in support of the view that in another like case betwixt the same parties previous findings *inter partes*, although competent evidence between the parties, *would not be conclusive.*

Whicker vs. Hume was not cited directly in our brief in the Court of Appeals, because it appeared conspicuously in the report of case of *Concha vs. Concha* (both in the H. of Lords and *below*, see 29 Ch. Div., 268), and to this attention had been called in that brief, p. 20, top. No mention is made in *Whicker vs. Hume* of the doctrine of estoppel *inter partes.* The estoppel under consideration there was a supposed *estoppel in rem.* Counsel in that case had argued that the *findings* had, in respect of estoppel, the same sort of effect as the *judgment*,—viz., *against all the world. That* is the proposition with which the case deals.

And that this is the point of that decision is clearly shown in *Concha vs. Concha:* as this is reported both in 11th Ap-

peals, 541, and in 29th Ch. Div., 268 · a case very elaborately and ably argued and considered. The opinions in both courts were *seriatim*, and unanimous; and rendered by such lawyers as Bowen, Fry, and Baggallay; and, in the House of Lords, Herschell, Blackburn, and Bramwell. A question occurred therein as to the domicil of a certain decedent at the time of his death, and the effect thereupon of a certain finding in probate incidental thereto: it having been contended, (1), that this created an estoppel of the nature of that by the judgment *in rem* which followed; or (2) at all events that, as betwixt certain persons, it created an estoppel *inter partes*.

As to the first point the Court quoted from, and *held* in accordance with *Whicker vs. Hume;* and as to the second, inasmuch as the matter *found* had been of no importance to the decision in the probate court, that such finding—upon elementary grounds—created no estoppel *inter partes;* and besides that, as by recent legislation English courts of *probate* are no longer courts also of *distribution*,—*findings* therein, even *inter partes*, are no longer [as when Bourchier *vs.* Taylor cited by this court in Caujolle's case—*ubi supra*—was decided,] of authority in other courts when exercising, as in the Concha case, jurisdiction in matters of *distribution*.

We quote from the opinion of the Lord Chancellor, 11 App., 548, passages which indicate its drift, as follows:

"It [the finding as to the domicil of the decedent,] is first put as an estoppel *in rem*, conclusive against all the world. That the mere fact that probate of the will was granted, is *not so* conclusive, is established beyond all possibility of question, by the decision of your Lordships' House. In the case of Whicker *vs.* Hume that very point was determined,

and that opinion was expressed by all the noble and learned Lords who advised the House on that occasion. Lord Cranworth says, 'The first question made is one which is extremely important, namely, the point whether probate was or was not conclusive evidence of the *domicil*,' &c., p. 551. * * *

"I pass therefore to the question whether it was an estoppel, as is alleged, *inter partes*" p. 552. * * * "I do not think that it is possible to contend successfully that Adelinda Concha would be conclusively bound by that determination of domicil of the testator unless the appellant would also be bound by it, so that if the decision had been the other way Adelinda Concha might have relied upon that determination by way of estoppel by securing to her the rights which she claimed," p. 553. * * * "It is said that the litigation is a litigation between the same parties. Now, I do not think that in the sense in which that language is used in the case of an estoppel it was really between the same parties so as to bind Adelinda," p. 554. * * *

[And then, after assigning reasons for this,—which turned upon a point of Chilian law,—he notices the case of *Bourchier vs. Taylor*, 1 Bro. P. C., 708, which had been cited as authority to show the existence of estoppel *inter partes*, and adds:] p. 555, bot.: "But it is to be observed, first, that in that case the question as to which he [the legatee] was held bound by reason of the decision against his predecessor in title, was the very point which had to be decided by the Spiritual Court. In the next place it must be remembered that at that time the spiritual court was a court of distribution as well as a court merely to determine the question of the validity of the testament and to grant probate or administration; it was a court of distribution concurrently with the court of chancery. It was said there by the noble and learned Lords in this House that the decision of a spiritual court would determine that question

for all purposes in which it had to deal; it was not merely for the purpose of saying to whom administration should go, but it would also determine it for any subsequent question which would arise in the same case in regard to the distribution of the estate. That finding would be a finding of the spiritual court for both purposes; so that it was impossible to hold that the court of chancery, being merely a court of concurrent jurisdiction for the purpose of distribution, would not be bound by the finding of the spiritual court in the matter of distribution, a finding between the same parties on the very point which in each case had to be determined."

We also observe in this connection that it is a well-ascertained rule for *the effect,—as evidence or when pleaded,*—of competent matter in judicial records from other States,—that such effect is regulated by *their effect in the same way in the other courts of the State from which they come.* And that, in Georgia, as above, this is *conclusive.*

It is therefore respectfully submitted that the record of the Georgia court of probate in question contained matter that as evidence was conclusive betwixt the plaintiffs and the defendant *as to the domicil of the decedent;* and that it was error in the Court of Appeals below to affirm the action of the Orphans' Court in excluding that record as evidence in the caveat before it and thereupon admitting the alleged will of the decedent to probate &c.

S. F. Phillips,
F. D. McKenney,
For the Plaintiffs.

October 5th, 1899.

Extracts from "Code of the State of Georgia," "1882" and "1895."

Constitution, article VI, section 1. (See "Code" of 1895, vol. 2, sec. 5831:) "The judicial powers of this State shall be vested in a supreme court, superior courts, courts of ordinary, justices of the peace," etc.

Article V, section 6. ("Code," etc., vol. 2, sec. 5852:) "The powers of a court of ordinary and of probate shall be vested in an ordinary for each county, from whose decisions there may be an appeal (or by consent of parties, without a decision) to the superior court under regulations prescribed by law."

"Code" of 1895, volume 2:

Ib. "SEC. 4232. Courts of ordinary have authority to exercise original and general jurisdiction of the following subjects-matter:

"1. Probate of wills.

"2. Granting of letters testamentary, of administration, and the repeal or revocation of the same.

"3. Of all controversies in regard to the right of executorship, and the right of administration.

"4. The sale and disposition of the real property belonging to and the distribution of deceased persons' estates.

* * * * * * *

"10. Of all such other matters and things as appertain or

relate to estates of deceased persons, and to idiots, lunatics, and insane persons."

"SEC. 4234. The ordinary can grant administration upon no person's estate who was not a resident of the county where the application is made at the time of his death, or, being a non-resident of the State, has property in said county, or a *bona fide* cause of action against some person therein."

"SEC 3393. Every application for letters of administration must be made to the ordinary of the county of the residence of the deceased, if a resident of this State, and if not a resident of this State, then in some county where the estate or some portion thereof is."

"SEC. 3394. The ordinary must issue a citation, giving notice of the application to all concerned, in the gazette in which the county advertisements are usually published, once a week for four weeks, and at the first regular term after the expiration of that time the application shall be heard, or regularly continued."

"SEC. 4254. Every application made to the ordinary for the granting of any order shall be by petition in writing, stating the grounds of such application, and the order sought" [&c., &c., unimportant here].

"Code" of *1882*:

"SEC. 2383. All wills (except nuncupative wills) disposing of realty or personalty, must be in writing, signed by the

party making the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the testator by three or more competent witnesses."

NOTE.—The present Code of *Georgia* was adopted December 16, 1895. The one immediately preceding was that of *1882*. The above-quoted provisions are however the same in both. But as Mr. Haralson died August 23, 1895, we have referred to the Code of *1882* for the formalities of wills; and to that of *1895* for the regulation of the application herein for letters of administration:—made in April, 1896.